

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A.W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WATKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village of Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

AFFIDAVIT

Civil Action No.
06 CIV 3755

Judge McMahon

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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

MARIANNE STECICH, being duly sworn, deposes and says:

1. I am the Village Attorney for the Village of Croton-on-Hudson and am familiar

with all matters stated in this affidavit, which I am submitting in opposition to the application of Buffalo Southern Railroad Inc. ("BSOR") for a preliminary injunction and other injunctive relief, and in support of the Village's application to lift the temporary restraining order issued by this Court on May 18, 2006.

2. At the outset, I must inform the Court that Plaintiff's description of its operations in Croton-on-Hudson is seriously misleading. As of the date of this affidavit, it is apparent that BSOR has not conducted any transloading operations at 1A Croton Point Avenue (also referred to as the "Site"). Its descriptions of the Site as the "BSOR Croton Yard," and of its putative operations as the "Transload Facility," are, at this point, pure fiction.

3. As stated in the affidavit of Charles A. Kane, a supervisor for Metro North Commuter Railroad, and one of the named defendants in this action, he works directly across from 1A Croton Point Avenue, has a clear view of the Site throughout the work day, and has seen no railroad or trucking activity at the Site since Metro Enviro vacated it and cleaned it up at the end of summer, 2005. In addition, Mr. Kane states that there are no signs marked "Buffalo Southern Railroad," or anything similar, at the Site or at the entrance to the Site. Since the recent removal of the "Metro Enviro Transfer" sign, there have been no signs at all at the Site indicating its name.

4. Annexed to this affidavit as Exhibit 1 are pages printed from the BSOR website on May 20, 2006. The home page of the site refers exclusively to operations in the Buffalo area. It does have a link to a page of announcements, including one dated

May 17, 2006 – the day before the instant action was commenced – stating: “The BSOR announces that they are now offering common carrier transportation services at its new Transload Facility in Croton-on-Hudson, New York. This facility serves Westchester County and New York City markets.”

5. I have spoken with the officials and employees in the Village Manager’s office and the Building Department, as well as with the Mayor and each of the Trustees, and none of them has been contacted by anyone from BOSR. Until the Village was served with the papers in the instant action, none of them had even heard of BSOR or the “BSOR Croton Yard.” The Village has at no time taken or threatened enforcement or other action against BSOR (other than opposing the instant lawsuit).

6. As will be described later in this affidavit, the property at 1A Croton Point Avenue was used since 1998 as a waste transfer station, operated by Metro Enviro Transfer, LLC and predecessor entities (collectively referred to as “Metro Enviro”). In July 2005, the New York Court of Appeals affirmed the Village’s right to close down Metro Enviro’s operations for serious environmental and permit violations. In September 2005, Metro Enviro vacated the site, and it has remained essentially dormant since.

7. Efforts over the past nine months by Northeast Interchange Railway – despite its misleading nomenclature, another waste hauler – to resume waste transfer station operations at the Site have been thwarted by rulings of the United States Surface Transportation Board and the Westchester County Supreme Court. The history of those efforts will be detailed in the following paragraphs.

Metro Enviro's C&D Transfer Station

8. In early 1997, Metro Enviro leased the site at 1A Croton Point Avenue for the purpose of operating a construction and demolition ("C&D") waste transfer station. Upon information and belief, there was a building on the property where C&D debris was processed, as it was transferred from trucks to rail cars. This building was generally known as the "processing building." It has not been known as the "Transload Facility" or anything of that sort.

9. Later in 1997, the 1600-foot stretch of track was installed along the westerly border of the property, adjacent to the Croton Harmon rail yard.

10. From 1998 through the summer of 2005, the site at 1A Croton Point Avenue was used as a C&D waste transfer station. The transfer station operated under a non-conforming use special permit, issued on May 4, 1998 by the Croton-on-Hudson Village Board of Trustees for a three-year period. The special permit contained 42 conditions relating to capacity limits, hours of operation, types of waste that could be accepted, and required training of personnel.

11. Beginning in 2000, Metro Enviro, in the words of the New York Court of Appeals, "repeatedly and intentionally violated conditions of the permit."¹ On the basis of those violations, and after a long series of hearings and investigations, the Croton-on-Hudson Village Board of Trustees voted, on January 27, 2003, not to renew the special

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Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 239, 800 N.Y.S.2d 535, 536 (2005).

use permit and directed Metro Enviro to cease operations on February 17, 2003. A copy of the Board's Statement of Findings underlying that decision is annexed to this affidavit as Exhibit 2.

12. Metro Enviro immediately brought a CPLR Article 78 proceeding in Westchester County Supreme Court to challenge the denial. The case was assigned to Justice Francis Nicolai, who, on February 19, 2003, invalidated the Board of Trustees' determination and enjoined the closure of the transfer station.

13. Justice Nicolai's order was reversed by the Second Department Appellate Division. Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 7 A.D.3d 625, 777 N.Y.S.2d 170 (2d Dep't 2004). The Appellate Division's decision was affirmed by the Court of Appeals, on July 6, 2005, at 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005). A copy of the Court of Appeals decision is attached to this affidavit as Exhibit 3.

14. On July 18, 2005, the Village directed Metro Enviro to cease accepting waste on July 23, 2005.

15. On July 21, 2005, Metro Enviro and Greentree Realty, LLC ("Greentree"), the owner of the Site, commenced another action before Justice Nicolai, essentially for a declaratory judgment that a C&D waste transfer facility could continue to operate at 1A Croton Point Avenue as a pre-existing, legal nonconforming use, and did not need a special permit.² On July 21, 2005, Justice Nicolai issued a temporary restraining order

²

Greentree Realty, LLC and Metro Enviro Transfer, LLC, Index No. 05-11872 (Westchester County Supreme Court).

enjoining the closure of the transfer station.

16. On August 26, 2005, Justice Nicolai issued an order enjoining the Village from “prohibiting or interfering with Greentree’s ability to lease and or operate it’s [sic] property for purposes of solid waste management, with the exception of Metro Enviro, which is required to comply with the Closure Order.” The decision indicated, however, that a solid waste facility would require a special permit from the Village. A copy of Justice Nicolai’s August 26, 2005 decision is annexed to this affidavit as Exhibit 4.

Northeast Interchange Railway’s Application to the Surface Transportation Board

17. Almost simultaneously with the proceeding before Justice Nicolai, another waste hauler, misleadingly named Northeast Interchange Railway, LLC (“NIR”), filed a Notice of Exempt Transaction with the United States Surface Transportation Board (“STB”), with respect to the 1600-foot length of track at 1A Croton Point Avenue. (This Notice was filed by James E. Howard, one of the attorneys for BOSR in the instant case.) According to its several submissions to the STB, NIR planned to acquire the assets of Metro Enviro, including its lease, and to transload construction and demolition waste over the 1600-foot stretch of track. Under the STB’s summary class exemption procedures, once a Notice of Exempt Transaction is filed, the exemption automatically becomes effective in seven days unless the STB takes adverse action. A copy of NIR’s Notice of Exempt Transaction is annexed to this affidavit as Exhibit 5.

18. The Village became aware of NIR's Notice of Exempt Transaction the day it was filed and immediately notified the STB that it would be seeking a stay of the exemption. On August 4, 2005, the Village filed a Petition to Reject the Notice of Exemption or, in the Alternative, for a Stay of Effectiveness. The next day, the STB issued an order staying the effectiveness of the Notice of Exempt Transaction until a further order of the STB. A copy of this order is annexed to this affidavit as Exhibit 6.

19. Three months later, on November 17, 2005, after extensive written submissions by both the Village and NIR, the STB rejected NIR's notice of exemption and ruled that if NIR wished to pursue its claim for exemption, it must "file either a petition for exemption under our case-by-case exemption procedures at 49 CFR part 1121, or a formal application under 49 U.S.C. 10901 and 49 CFR 1150 Subpart A." The STB stated its concerns as follows:

NIR's proposed transaction is controversial and raises important issues that make more scrutiny and the development of a more complete record necessary. The current construction and demolition waste operation at the site has attracted substantial opposition and local interest, including litigation in which the operations of NIR's predecessor were found to be a threat to the public health by the state court. Moreover, NIR has expressed an intent to convert this previously private construction waste transfer operation in to what could turn out to be a more extensive for-hire common carrier operation involving commodities in addition to construction waste.

A copy of the STB's complete Decision is annexed to this affidavit as Exhibit 7.

20. NIR never filed a petition for exemption or a formal application.

21. To the best of my knowledge, BSOR has not applied for STB approval to extend its operations to the 1600-foot stretch of track at 1A Croton Point Avenue.

Northeast Interchange Railway's State and Local Applications

22. While its matters were pending before the Supreme Court and the STB, NIR applied to the Westchester County Solid Waste Commission for a hauler's license, in order to commence waste transfer operations at 1A Croton Point Avenue. (NIR's attorneys on its matters in New York State were Crane, Parente, Cherubin & Murray, the attorneys for BOSR in the instant action.)

23. The Village urged the Solid Waste Commission not to issue the license on the grounds that the Village had evidence that several waste facilities in the Northeast owned and/or operated by NIR's parent company, Regus Industries, LLC ("Regus"),³ had been the subject of governmental enforcement actions, or had been investigated, for violating federal, state, and local permitting requirements and conditions.

24. The Village was particularly concerned about the Warren Hills C&D Landfill in Ohio, operated by Regus at the time the Ohio Attorney General commenced an action for a series of violations in operating the landfill. This action resulted in a consent order between the State and the Warren Hills Landfill operator, which continued to violate the consent order, causing the State of Ohio to commence a contempt proceeding.

³

NIR is a wholly owned subsidiary of Regus, apparently created for the purpose of operating the proposed transfer station in Croton-on-Hudson.

Additionally, while Regus was operating the Warren Hills Landfill, the federal Agency for Toxic Substances and Disease Registry warned of an “urgent public health hazard” posed by high concentrations of hydrogen sulfide at the landfill. Subsequently, the Emergency Response Branch of the United States Environmental Protection Agency determined that a substantial public health threat was posed by the site. The Village’s correspondence relating to this landfill and other Regus operated waste facilities is annexed to this affidavit as Exhibit 8.

25. Nonetheless, in December 2005, the Solid Waste Commission granted NIR a hauler’s license. The next month, the New York State Department of Environmental Conservation issued it a permit for a C&D waste processing facility at 1A Croton Point Avenue.

26. While its application before the Solid Waste Commission was pending, Andreas Gruson, the Chief Executive Officer of NIR, telephoned Richard Herbek, the Croton-on-Hudson Village Manager, and told him that NIR intended to commence waste transfer operations at 1A Croton Point Avenue as soon as NIR received its County license and State DEC permit, and that it did not need any approvals from the Village.

27. The Village, therefore, as soon as NIR received its hauler’s license, commenced an action against NIR in Westchester County Supreme Court for a temporary restraining order and preliminary injunction enjoining NIR from commencing waste transfer station operations at the Site without first obtaining either a use variance or a special permit from the Village. The Village was successful in its application and, on

April 27, 2006, Justice Nicolai issued a preliminary injunction enjoining “NIR and its affiliate RSA . . . from operating a transfer station at the Property without first obtaining a special permit in accordance with the Village’s Zoning Code.” A copy of Justice Nicolai’s April 27, 2006 Decision is annexed to this affidavit as Exhibit 9.

28. As of today, NIR has not applied for a special permit. Neither has any other entity applied to the Village for a special permit for a C&D waste transfer station or other use at the Site, or for a certificate of occupancy for an as-of-right permitted use, such as a railroad at the Site.

29. It is important to note that in its applications to the state and county, NIR never described its operations as rail transportation. Even in the proceeding before the Surface Transportation Board, NIR stated that it intended to provide rail transportation service for the purpose of transloading construction and demolition waste.

Eminent Domain Preliminary Steps

30. While the litigation was pending in Westchester Supreme Court, the Village took preliminary steps toward making a determination whether to acquire the 1A Croton Point Avenue site under the New York State Eminent Domain Procedure Law, for the purpose of using it as a Department of Public Works (“DPW”) garage and storage facility.

31. On February 6, 2006, the Village Board of Trustees conducted a public hearing to determine whether there was a municipal need for the Site. The Village

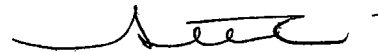
Manager, Village Engineer, and Superintendent of Public Works testified in detail that the Village needs a new DPW facility, as well as a storage site for other Village uses; that the Village has a pressing need for parking above the tidal flood line; that the site at 1A Croton Point Avenue is well-suited for those needs; and that the Village had explored many other sites to meet those needs but was unsuccessful. A copy of the minutes of the public hearing, which includes a transcript of the testimony of the three Village officials is annexed to this affidavit as Exhibit 10.

32. The Village has begun its review under the State Environmental Quality Review Act of the proposed acquisition and development of the Site.

33. The Village has made no final decision on whether to acquire the Site or develop a facility there.

34. Annexed as Exhibit 11 are pages printed from the web site of the New York Department of State on May 20, 2006, indicating that Greentree Realty LLC, Hanson Aggregates New York, Inc., and Coastal Distribution, LLC are New York corporations.

35. Annexed as Exhibit 12 are papers from the files of the Village concerning the Village's approval in 2003 of a special permit application for the Max Finkelstein Tire Warehouse.



Marianne Stecich

Sworn to before me this 23rd
day of May, 2006



Notary Public

MICHAEL B. GERRARD
Notary Public, State of New York
No. 4943936
Qualified in Westchester County
Commission Expires Nov. 7, 1990
2006